No. 10,190

United States Circuit Court of Appeals

For the Ninth Circuit

STERLING CARR, as Trustee in Bankruptcy of NIPPON YUSEN KABUSHIKI KAISYA, a Corporation, Bankrupt, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD., a Corporation, and J. M. ANDERSEN,

Appellees.

(And Fourteen Consolidated Appeals.)

APPELLANTS' PETITION FOR A REHEARING

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To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

By decision herein filed June 28, 1943, the Court affirmed in part and reversed in part the decree of the District Court. It held appellants, petitioners herein, as we under-

stand it, solely at fault for the loss of the Olympic II, and the Olympic II in mutual fault for loss of life, and personal injuries to third persons and loss of their personal effects and for loss of other personal property of third persons aboard the Olympic II.

We address this petition to the Court primarily for the reason that its decision makes no reference to Article 9 of the International Rules of the Road as applied to a vessel in the situation of the Olympic, and secondarily for the reason that we feel this Court, like the District Court, has given greater weight to the testimony of witnesses who had no occasion to observe the facts about which they testified than to the testimony of witnesses whose attention was engaged by and directed to such occurrences. Thirdly, we feel that the decision of the Court is clearly inconsistent with the principles laid down by the First and Second Circuits in fog cases. Lastly, we believe that the opinion does not clearly exhibit the Court's intention to dispose of the entire matter in controversy.

I.

THE PROVISIONS OF ARTICLE 9(i) OF THE INTERNATIONAL RULES OF THE ROAD

The attention of the Court was directed to this Rule of the Road on pages 25 et seq. of appellants' opening brief and on page 8 of appellants' reply brief. This article provides unequivocally that vessels line-fishing with their lines out shall in fog, etc. "at intervals of not more than one minute make a blast; if steam vessels, with the whistle

or siren, and if sailing vessels, with the foghorn, each blast to be followed by ringing the bell."

It is undisputed that the Olympic II had a foghorn on board and did not use it. The only argument advanced against the applicability of this section to the Olympic II by her counsel was the suggestion that it applied only to a moving vessel. It is doubtless true that trawlers will be moving when they are required to give this signal. It is manifest that drift-net vessels *may not* be moving at such times. The same would be true in the case of dredging for shell fish of various kinds. Vessels "line-fishing with their lines out" might be engaged in trolling or be anchored as was the Olympic II. The statute makes no distinction based upon use of motive power to propel the vessel.

As we noted in our briefs, there is no judicial construction of this statute. Its predecessor (Article 10 of the Regulations of 1885, 23 Stat. 439, repealed (1894) 28 Stat. 82 and re-enacted (1895) 28 Stat. 281) had application only to fishing vessels "when in the sea off the coast of Europe lying north of Cape Finisterre". (See historical note to 33 U.S.C.A. Sec. 79).

The original text of Article 9 (the former Article 10) was so vague and of such uncertain application that it was severely criticized by Sir F. Jeune, President in the case of

The London (1904) 10 Asp. M.L.C. 12, (1904) P. 355, decree modified to mutual fault (1905) P. 152, C.A.

We quote from the opinion of the learned President:

"Art. 10(g) of the Regulations of 1884 is now in force as art. 9(g) of the Regulations of 1897. The material parts of it are as follows:

'The following portion of this article applies only to fishing vessels and boats when in the sea off the coast of Europe laying north of Cape Finisterre: (g) In fog, mist, or falling snow, a drift net vessel attached to her nets, and a vessel when trawling, dredging, or fishing, with any kind of drag net, and a vessel employed in line fishing with her lines out, shall at intervals of not more than two minutes make a blast with her foghorn and ring her bell alternately.' "

* * * * * * *

* * * "In a matter of this kind, and especially in the case of rules which are to affect a class of vessels which are obviously not manned by the same class of men as man vessels of greater size and value, it is of importance that such rules should be as clear as possible; and they should be international rules, so as to bind the vessels of other nations as well as our own; and it is desirable they should extend not only to vessels lying off the coast of Europe, but also to vessels navigating the coast of America, nor should they be limited to fishing vessels and boats when off the coast of Europe lying to the north of Cape Finisterre. I say this in the hope that those in authority will see their way before long to make clear and efficient international rules on this important subject."

* * * * * * *

* * * "I am not prepared to say that if the Anson had been whistling regularly every two minutes, and, still more, if she had been ringing her bell, the London

would not have had, at any rate, opportunity of hearing more than she did, with the result that her action would have been different. I do not mean to say that I think the rule which requires a whistle to be sounded and a bell rung alternately is a good rule, because I think that the mixing of two different signals—one being the signal for a vessel under way and the other for a vessel at anchor—is unwise; but that is not material in this case, for all I have to consider is whether, if a vessel does not perform her obligations under that rule, she can say it is immaterial whether she did or not, because nothing could have happened if she had which would have tended to prevent this collision. If the Anson had obeyed this rule I think it might have been the case that the London would have had earlier information of the Anson, and would have been able to act accordingly."

The hope of the Court that the rules would be clarified and made of application in all waters was realized by the revision adopted in the United States in 1907. However, this revision retained the requirement that both foghorn and bell be used by fishing vessels when fishing in foggy weather regardless of what kind of gear was used and regardless of whether such vessels were or were not under way. At the same time, the interval between signals was reduced from two minutes to one minute.

Should the Court be in doubt that this subdivision of Article 9 applies to an anchored vessel when line-fishing, we respectfully request that it examine the third paragraph of subsection (g) of the same article, which provides that fishing vessels at anchor, if attached to nets or other gear, display, at night, additional lights on the

approach of other vessels. This subdivision clearly recognizes, as does Article 9(i), that fishing vessels, when using nets or other fishing gear while at anchor, are a greater source of danger to approaching vessels than when simply at anchor without gear out. In fog or other conditions of obscuration, sound is the substitute for sight. It was and is the manifest intent of the statute to require a special signal from a fishing vessel when a vessel approaching in a fog has both a hull and other gear to reckon with. Both a signal of the foghorn and a sounding of the bell were required of the Olympic II.

The instant decision stands now as an implied precedent that the ordinary anchor bell is all that a vessel in the Olympic's situation, with gear extending far beyond her hull, near a harbor entrance, directly athwart the courses of moving vessels, and so manned and equipped as to be incapable of observing other precautions for her own safety and that of her passengers, need sound. Resumption of the trade of these vessels may be expected after the war, and the implied decision of the Court on this important point might well be relied upon by them, with the result that other lives and property may be lost.

We respectfully submit that the Olympic produced nothing to show that compliance with Article 9(i) would not have avoided collision or that her violation of this Article could not have contributed to it and to the loss of the Olympic herself.

II.

THE TESTIMONY AS TO RINGING OF THE OLYMPIC'S BELL

We respectfully urge that the Court reconsider this point by reviewing the matters set forth in our opening briefs. The witnesses who testified that it was not rung during the critical periods are those whose attention was being exercised to hear it. The man who actually had charge of ringing it *thought* he stopped at some time after he saw the Sakito Maru. All witnesses who said they heard the bell had absolutely no occasion to pay particular attention, as, being on stationary vessels, they had nothing to fear from vessels at anchor. We have no doubt the Olympic's bell was rung during much of the period after 6:30 on the morning of the collision at regular intervals. We do not believe there is any credible testimony that it was being so rung as the Sakito Maru approached the Olympic.

III.

THE DECISION HEREIN CONFLICTS WITH THE DECISIONS IN THE FIRST AND SECOND CIRCUITS

We respectfully submit that the decision of this Court in relation to navigation in fog conflicts with the decisions of the First and Second Circuits in the following cases:

La Bourgogne (1898) 86 Fed. 475 (C.C.A. 2) affirming 76 Fed. 868;

The Benjamin A. Van Brunt (1899) 98 Fed. 121 (C.C.A. 1);

The Kennebec (1901) 108 Fed. 300 (C.C.A. 2);

The Kungsholm, 1938 A.M.C. 1334, 1342 (S.D.N.Y.).

In the first above case, the writ of certiorari was denied in 172 U.S. 646. Moreover, as recently as the decision in

United States v. Monstad (1943) 134 Fed.(2d) 986, 988 (C.C.A. 9),

this Court recognized the duty of an anchored vessel to be prepared to take steps to avoid collision in fog.

IV.

THE OPINION OF THE COURT OMITS REFERENCE TO CLAIMS FOR LOSS OF PERSONAL PROPERTY OTHER THAN PERSONAL EFFECTS OR FOR PERSONAL INJURIES CONSEQUENT UPON THE LOSS OF THE OLYMPIC II.

The record herein discloses that in addition to loss of life and personal effects claims of third persons for personal injuries and property damage were put forward. The opinion of the Court, we believe, intended that no distinction should be made in respect to these third party claims and that only the claim advanced by the owners of the Olympic II for her loss should be treated as a liability for which the Sakito Maru was alone responsible.

This appears to us clear from the Court's reference to the provisions of 46 U.S.C.A. sec. 395, under which the local inspectors are required to "satisfy themselves that such barge is of a structure suitable for the service in which she is to be employed * * * and is in a condition to warrant the belief that she may be used in navigation with safety to life." Clearly personal injuries consequent upon this collision stand, so far as concerned the consequences for failure to comply with regulations, upon

the same footing as loss of life. Equally clearly, we believe, loss of personal property of third persons entrusted to the care of the barge resulting from the breach of regulations, should be treated no differently than loss of personal effects of death and personal injury claimants. In neither case did Olympic II sustain her burden as defined in the Court's opinion.

We respectfully request that the mandate of the Court, when issued, shall clearly reflect the decision of the Court and its intention to dispose of the entire controversy leaving no point open to possible contention in the District Court. In brief, we request that the opinion be modified to show, or the mandate issue in such manner as to exhibit, that the decision of the Court in respect to the losses to which the Olympic II's owners must contribute is not restricted to claims for loss of life and personal effects but embraces claims for personal injuries and loss of other personal property owned by third persons and carried on board the Olympic II.

Respectfully submitted,

Lillick, Geary, McHose & Adams,
Ira S. Lillick,
Kent A. Sawyer,
Proctors for Appellants and Petitioners.

CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for appellants and petitioners in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
August 14, 1943.

Kent A. Sawyer

Of Counsel for Appellants and Petitioners.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

STERLING CARR, as Trustee in Bankruptcy of NIPPON YUSEN KABUSHIKI KAISYA, a corporation, Bankrupt, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD., a corporation, and J. M. ANDERSEN,

Appellees.

(And Fourteen Consolidated Appeals.)

No. 10,190

Jun. 28, 1943

Upon Appeals from the District Court of the United States for the Southern District of California, Central Division

Before: DENMAN, MATHEWS and STEPHENS, Circuit Judges.

DENMAN, Circuit Judge:

Sterling Carr, as Trustee in Bankruptcy of Nippon Yusen Kabushiki Kaisya, a corporation, Bankrupt, hereinafter called Nippon, and Fidelity and Deposit Company of Maryland, a corporation, appeal from an interlocutory decree in admiralty holding Nippon solely in fault for a collision of its Japanese Motorship Sakito Maru, motoring toward Los Angeles Harbor, with the pleasure fishing barge Olympic II, owned by appellee, Hermosa Amusement Corporation, Ltd., a corporation, hereinafter called Hermosa, the Olympic being anchored at bow and stern while fishing at Horseshoe Kelp in the Pacific Ocean, approximately 3¼ nautical miles from the lighthouse on the west breakwater of Los Angeles Harbor, whereby the Olympic became a total loss, several persons on her were drowned and personal effects lost.

A. *The Sakito's liability for the sinking of the Olympic.* The Sakito, crashing into the anchored Olympic, has the burden of

overcoming the presumption that she was at fault and the Olympic not at fault in causing the Olympic's sinking.

In admiralty this presumption does more than merely require the Sakito's going forward and producing some evidence on the presumptive matter, as in civil suits. Cf. New York Life Insurance Co. v. Gamer, 303 U. S. 161, 171. It places a "burden of proof" on the moving vessel "to show either that the steam-tug [the moving vessel] was without fault or that the collision was occasioned by the fault of the schooner [the anchored vessel], or that it was the result of inevitable accident." The Clarita and The Clara, 23 Wall. 1, 13; The Oregon, 158 U. S. 186, 193; United States v. King Coal Co., 5 F. 2d 780, 783 (CCA-9). Here there is no evidence warranting a finding of inevitable accident.

All the crucial witnesses on both sides testified in open court, with the exception of the Sakito's first officer and lookout. Their testimony, given by deposition in advance of the trial, was in the main consistent with the story of the Sakito's master, who was heard by the court.

There is abundant testimony of these witnesses, heard by the trial court, from which that court could infer that Horseshoe Kelp is a customary and proper place for the anchorage of the fishing barge and that in no way did the Olympic cause an obstruction to the proper navigation of vessels approaching or leaving the harbor.

So far as concerns the Sakito's burden of proof of her charge that the Olympic's crew failed to give the proper signals in the existing fog conditions, and that the Olympic was not properly manned, the Olympic's crew's testimony and that of persons on nearby vessels was heard by the trial court and seems to us acceptable for sustaining even a burden of proof on the Olympic of her lack of fault. True, as to the signals, it is opposed in part by the depositions of the Sakito's lookout and mate, but there is nothing in the cold pages before us of *all* these witnesses which places us in a position to attempt to reverse the decision of a court which had the opportunity of appraising the mental capacity, memory and veracity of so many witnesses. The Ernest H. Meyer, 84 F. 2d 496, 501 (CCA-9). We sustain that court's decision and hold, not only has the Sakito not maintained her burden of proving fault in the manning of the Olympic or in the conduct of her

crew but, that the latter is shown to be without fault contributing to the collision.

Similar conditions apply to the burden of proof on the Sakito to show she was without fault in her navigation into the Olympic.

There is some dispute as to her speed, but the fact the scars on the Sakito show that she penetrated into the Olympic's iron frame and plates to her midship section for 23 feet of the latter's 38-foot beam, smashing in not only the latter's side plates and between decks but her bottom and keel, to us proves conclusively that the Sakito's navigator did not have the control over her which would enable her to be dead in the water in half the visible distance between her and the anchored Olympic. The Ernest H. Meyer, supra, 497; The Silverpalm, 94 F. 2d 754, 757 (CCA-9); The Catalina, 95 F. 2d 283, 286 (CCA-9). It is possible there is an exception to the rule of these cases where there is a sudden change in visibility such as running into an extraordinary fog density from a much lighter fog area, but no such condition is shown here to aid the Sakito's burden of proof. We hold that the appellants are liable to appellee Hermosa for the total loss of the Olympic.

B. *The liability for the death and personal property loss on the sinking of the Olympic.* The sinking of the Olympic caused the deaths of a number of persons on her and the loss of certain personal effects. The district court held that Sakito solely at fault for these losses. Nippon contends that Hermosa, if not solely at fault, causatively contributed to these losses.

Sakito's causative relation to the loss of life and personal effects is apparent. The question remaining is whether Hermosa is also at fault, in which event one-half of Nippon's liability to the claimants for loss of life and personal effects must be shared by Hermosa. The Chattahoochee, 173 U. S. 540, 554, 555; Erie R. Co. v. Erie and Western Transportation Co., 204 U. S. 220, 226; Aktslsk. Cuzco v. Sucarseco, 294 U. S. 394, 401.

The Olympic was an ocean-going barge of over 100 tons. She was navigating the Pacific at the time she was carrying the pleasure fishermen and others at Horseshoe Kelp and hence required to comply with the requirements of the United States local inspectors as to her structure and otherwise. United States v. Monstad, 134 F. 2d 986, 987 (CCA-9). The Los Angeles local

inspectors had required of the Olympic and other pleasure fishing barges operating in the neighborhood of Los Angeles Harbor and within the control of these inspectors, that the annual thousands of fishermen they carry should be protected from just such a collision as occurred here by having the hull of each compartmented by sufficient water-tight transverse bulkheads to keep the vessel afloat if one of the compartments were flooded.

The specific requirement on the Olympic as a condition for the issuance of the inspectors' certificate[1] permitting her operation was "a sufficient number of transverse watertight bulkheads * * * fitted so that the vessel will remain afloat with positive stability in the event any one main compartment is flooded."

Here was an administrative function of a local matter which Congress had specifically delegated to the local inspectors. They and nobody else could perform it. Cf. Morgan v. United States, 298 U. S. 468, 481. We can see nothing arbitrary or irrational in the bulkhead requirement. On the contrary, it seems to us a wise exercise of the inspectors' administrative duty.

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[1] 46 U. S. C. A. "§ 395. Seagoing barges: certificates. The local inspectors of steamboats shall at least once in ever year inspect the hull and equipment of every seagoing barge of one hundred gross tons or over, and shall satisfy themselves that such barge is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in a condition to warrant the belief that she may be used in navigation with safety to life. They shall then issue a certificate of inspection in the manner and for the purposes prescribed in sections 399 and 400. (May 28, 1908, c. 212, § 10, 35 Stat. 428.)

"§ 396. Equipment of barges with life-saving appliances. Every such barge shall be equipped with the following appliances of kinds approved by the board of supervising inspectors: At least one lifeboat, at least one anchor with suitable chain or cable, and at least one life preserver for each person on board. (May 28, 1908, c. 212, § 11, 35 Stat. 428.)

"§ 397. Certificate of inspection and equipment of barge required. A register, enrollment, or license shall not be issued or renewed by any collector or other officer of customs to any such barge unless at the time of issue or renewal such barge has in force the certificate of inspection prescribed by section 395 and on board the equipment prescribed by the preceding section. (May 28, 1908, c. 212, § 12, 35 Stat. 428; Mar. 4, 1915, c. 184, § 6, 38 Stat. 1218.)"

Hermosa failed to install the bulkheads and the inspectors refused their certificate. Instead of withdrawing the Olympic, Hermosa continued in its business of accepting the pleasure fishermen and exposing them to the danger from which the local inspectors' requirements aimed to protect them.

The district court, whose decree preceded our decision in the Monstad case, erred in holding that the Olympic was not under the jurisdiction of the local inspectors and that, even if so, the inspectors had no power to require the bulkheads.

Nippon contends that Hermosa's violation of the requirement of the Congressional statute, occurring at the moment of the drownings and loss of personal effects, places on Hermosa the burden of proving that the absence on the bulkheads not only did not contribute but "*could not have contributed*" to the loss, under the rule of The Pennsylvania, 19 Wall. 125, 136; The Denali, 112 F. 2d 952 (CCA-9); Lie v. S. F. & Portland S. S. Co., 243 U. S. 291, 298. In this we agree.

Hermosa has not sustained this heavy burden of proof. The Olympic sank in between three and four minutes. Hermosa's expert first testified that

> "* * * I believe that, in the first place, if you strike a vessel that hard—I am still going to insist on hitting that is a hard blow, 23 feet—the decks would fall down. That would be the first thing that would happen; and the whole structure of the vessel would collapse and render those bulkheads asunder."

On cross-examination he admitted

> "Q. With such water-tight bulkheads, such a barge would remain afloat much longer than it would without them, isn't that correct?
>
> A. That is right what I believe, Mr. Adams."

The Hermosa has not proved that her violation of the statutory requirement could not have contributed and that if the Olympic had the required bulkheads she could not have remained afloat long enough for all the people on board and the personal effects to be safely removed.

Nippon contends that Hermosa's violation of the statutory requirement for the safety of the lives on board makes Hermosa also in fault for the sinking of the Olympic and that there should be a division of damages for her loss. We do not agree. The statutory requirement was for the protection of lives after such an occurrence as a collision, not for the prevention of collisions.

We hold Hermosa liable to Nippon for half the liability of Nippon to the claimants for the loss of life and personal effects.

It is apparent that the claimants have no interest in the above issues between Nippon and Hermosa. Nippon did not summons the claimants to appear in this court and Hermosa has moved the dismissal of Nippon's appeal because there was no summons of the other claimants for their appearance or severance from the appeal. Obviously, since none of the claimants has any interest in this liability of Hermosa to Nippon, there was no obligation to summons them so far as concerns that issue.

None of the claimants appealed from the district court's decision that Hermosa was not liable to them. Quite likely this is because they were satisfied with the stipulation for the value of the Sakito, given in her release, and did not wish to incur the expense of the appeal. However, since if summoned they would either have been adverse parties to Hermosa or, if severed, no parties at all, Hermosa is not prejudiced by the failure to summons them. The motion to dismiss the appeal is denied.

The interlocutory decree is affirmed in its holding that Nippon is liable in full to Hermosa for the loss of the Olympic. Insofar as it holds that Hermosa is not liable to Nippon for one-half the liability of Nippon for the loss of life and personal effects it is reversed. The cause is remanded for the determination of the amounts of Hermosa's and Nippon's liabilities to each other.

Affirmed in part and reversed in part.

(Endorsed:) Opinion. Filed Jun. 28, 1943. Paul P. O'Brien, Clerk.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO. 6/29/43—100.